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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 COYNESS L. ENNIX, JR., M.D.,

17 Plaintiff,

18 v.

19 ALTA BATES SUMMIT MEDICAL CENTER,

20 Defendant.
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CASE NO. C 07-2486 WHA

DISPUTED JURY INSTRUCTIONS

DATE: June 2, 2008
TIME: 7:30 a.m.
DEPT: Ctrm. 9, 19th Flr.
JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: June 2, 2008

Defendant's Proposed Jury Instruction 1: General

Plaintiff Dr. Coyness Ennix, Jr. has brought a claim of discrimination against the defendant, Alta Bates Summit Medical Center. The plaintiff claims that his race [**African American**] was a motivating factor for the defendant's decision to [**restrict his surgical privileges**].

The defendant denies that the plaintiff's race was a motivating factor for the defendant's decision to [**restrict plaintiff's surgical privileges**] and further claims that the decision to [**restrict plaintiff's surgical privileges**] was based upon a lawful reason.

Ninth Circuit Model Civil Jury Inst 10.1A (2007) [**modified**].

Disputed Jury Instruction No 1, Re General, Offered by Plaintiff

Plaintiff Dr. Coyness Ennix, Jr. has brought a claim of discrimination against the defendant, Alta Bates Summit Medical Center. Dr. Ennix claims that his race was a motivating factor for the defendant's decision to **subject him to heightened peer review and to suspend and restrict his surgical privileges.**

The defendant denies that Dr. Ennix's race was a motivating factor for the defendant's decision to **subject him to heightened peer review and to suspend and restrict his surgical privileges** and further claims that defendant's actions were based upon a lawful reason.

Authority:

Ninth Circuit Model Civil Jury Inst 10.1A (2007) [modified].

Disputed Jury Instruction 2: 42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) Definition

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and under color of State law.

42 U.S.C. § 1981.

Disputed Jury Instruction No 2, Re 42 U.S.C. § 1981, Offered by

Plaintiff

Plaintiff contends that no such instruction should be given.
The statutory elements are addressed in other instructions,
making this instruction superfluous and potentially confusing
for the jury.

Disputed Jury Instruction 4: Requirement of a Contractual Relationship

Dr. Ennix has alleged a claim for racial discrimination under 42 U.S.C. Section 1981. This claim requires that Dr. Ennix prove that he had a contract that was impaired **[due to racial discrimination]** by ABSMC's adverse actions against him.¹

The existing or proposed contract that Plaintiff contends was impaired must be one in which plaintiff Dr. Ennix—as opposed to a third party—had, or would have had, rights.²

To prove that a contract was created, Dr. Ennix must prove all the following:

That the contract terms were clear enough that the parties could understand what each was required to do;

That the parties agreed to give each other something of value; and

That the parties agreed to the terms of the contract.

If Dr. Ennix did not prove all of the above, then a contract was not created.³

A contract may be written or oral and an oral contract is just as valid as a written contract.⁴

Dr. Ennix claims that he had a contract with ABSMC and contracts with specific patients, and that defendant's actions

¹ 42 U.S.C. § 1981(b); *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1144-1145 (9th Cir. 2006).

² *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476, 479-480 (2006).

³ CACI Model Jury Instruction 302 (Contract Formation—Essential Elements); California Civil Code Section 1510.

⁴ CACI Model Jury Instruction 304 (Oral or Written Contract Terms).

1 deprived him of his ability to perform under or enjoy the
2 benefits of these contracts.

3 If you find that Dr. Ennix had a contract with either ABSMC or
4 a specific patient, and ABSMC's actions **[wrongfully or**
5 **illegally]** prevented Dr. Ennix from performing his obligations
6 under the contract or enjoying the benefits of that contract,
7 then Dr. Ennix has proved he had a contract, and your verdict
8 may be for plaintiff if you find he has proven the other
9 elements of his claim.

10 If you find that Dr. Ennix did not have a contract that was
11 **[wrongfully or illegally]** impaired by ABSMC's actions, then
12 your verdict should be for defendant.
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Disputed Jury Instruction No 4, Re Requirement of a Contractual Relationship

Offered by Plaintiff

Dr. Ennix has alleged a claim for racial discrimination under 42 U.S.C. Section 1981. This claim requires that Dr. Ennix prove that he had a contract that was impaired by ABSMC's adverse actions against him.

The existing or proposed contract that Dr. Ennix contends was impaired must be one in which Dr. Ennix—as opposed to a third party—had, or would have had, rights.

To prove that a contract was created, Dr. Ennix must prove all the following:

That the contract terms were clear enough that the parties could understand what each was required to do;

That the parties agreed to give each other something of value; and

That the parties agreed to the terms of the contract.

If Dr. Ennix did not prove all of the above, then a contract was not created.

Dr. Ennix claims that he had a contract with ABSMC and contracts with specific patients, and that defendant's actions deprived him of his ability to perform under or enjoy the benefits of these contracts.

A contract may be written or oral and an oral contract is just as valid as a written contract.

1 If you find that Dr. Ennix had a contract with either ABSMC or
2 a specific patient, and ABSMC's actions prevented Dr. Ennix
3 from performing his obligations under the contract or enjoying
4 the benefits of that contract, then Dr. Ennix has proved he
5 had a contract, and your verdict may be for Dr. Ennix if you
6 find he has proven the other elements of his claim.

7 If you find that Dr. Ennix did not have a contract that was
8 impaired by ABSMC's actions, then your verdict should be for
9 defendant

10 Authority:

11 *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 144-145 (9th Cir. 2006)

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13 CACI Model Jury Instruction 302. Contract Formation—Essential Elements
14 California Civil Code Section 1510

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16 CACI Model Jury Instruction 304. Oral or Written Contract Terms
17 California Civil Code Section 1622

1 **Disputed Jury Instruction 6: Intentional Discrimination**

2 In order for Dr. Ennix to recover on his claim against
3 defendant Alta Bates Summit Medical Center, Dr. Ennix must
4 prove that defendant Alta Bates Summit Medical Center
5 intentionally discriminated against him. That is, plaintiff's
6 race must be proven to have been a motivating factor in
7 defendant's decision to **[restrict Dr. Ennix's surgical**
8 **privileges.]**

9 Direct evidence is evidence "which, if believed, proves the
10 fact of discrimination without inference or presumption."

11 Direct evidence of discrimination would include statements
12 showing a discriminatory motivation for the defendant's
13 treatment of Dr. Ennix.

14 Indirect or circumstantial evidence of discrimination would
15 include proof of a set of circumstances sufficient to create a
16 reasonable inference that race was a motivating factor in the
17 defendant's treatment of Dr. Ennix. Indirect or circumstantial
18 evidence includes evidence that the reasons Alta Bates offers
19 for its **[restrictions on Dr. Ennix's surgical privileges]** is a
20 pretext for discrimination.

21 *Beck v. United Food and Commercial Workers Union, Local 99, 506 F.3d 874, 883-84*
22 *(9th Cir. 2007).*

**Disputed Jury Instruction No 6, Re Intentional Discrimination, Offered
by Plaintiff**

In order for Dr. Ennix to recover on his claim against defendant Alta Bates Summit Medical Center, Dr. Ennix must prove that defendant Alta Bates Summit Medical Center intentionally discriminated against him. That is, Dr. Ennix's race must be proven to have been a motivating factor in defendant's decision to **subject Dr. Ennix to heightened peer review and to suspend and restrict his surgical privileges.**

Direct evidence is evidence "which, if believed, proves the fact of discrimination without inference or presumption."

Direct evidence of discrimination would include statements showing a discriminatory motivation for the defendant's treatment of Dr. Ennix.

Indirect or circumstantial evidence of discrimination would include proof of a set of circumstances sufficient to create a reasonable inference that race was a motivating factor in the defendant's treatment of Dr. Ennix.

Indirect or circumstantial evidence of discrimination may include evidence that the reason Alta Bates Summit Medical Center offers for its decision to **subject Dr. Ennix to heightened peer review and to suspend and restrict his surgical privileges** is a pretext for discrimination.

Indirect or circumstantial evidence of discrimination may include examples of similar discriminatory treatment by **ABSMC** against other individuals of color. If you find that **ABSMC's** treatment of Dr. Ennix was consistent with a general pattern of discrimination against individuals of

1 color, then you may infer that Dr. Ennix's race was a
2 motivating factor in ABSMC's decision to subject Dr.
3 Ennix to extensive peer review and suspend or restrict
4 his medical staff privileges and your verdict should be
5 for plaintiff.

6 Authority:

7 *Beck v. United Food and Commercial Workers Union, Local 99*, 506 F.3d 874, 883-4
8 (9th Cir. 2007).

9
10 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

11
12 *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 147 (2000).

Disputed Jury Instruction 7: Elements of Discrimination Claim

As to the plaintiff's claim that his race was a motivating factor for the defendant's decision to **[restrict his surgical privileges]**, the plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. the plaintiff's **[surgical privileges were restricted]** by the defendant; and
2. the plaintiff's race was a motivating factor in the defendant's decision to **[restrict the plaintiff's surgical privileges.]**

If you find that the plaintiff has proved both of these elements, your verdict should be for the plaintiff. If on the other hand, the plaintiff has failed to prove either of those elements, your verdict should be for the defendant.

Ninth Circuit Model Civil Jury Inst 10.1C (2007) **[modified]**

Disputed Jury Instruction No 7, Re Elements of Discrimination,

Offered by Plaintiff

As to the Dr. Ennix's claim that his race was a motivating factor for the defendant's decision to **subject Dr. Ennix to heightened peer review and to suspend and restrict his surgical privileges** is a pretext for discrimination., Dr. Ennix has the burden of proving both of the following elements by a preponderance of the evidence:

1. Dr. Ennix's surgical privileges were restricted by the defendant; and

2. Dr. Ennix's race was a motivating factor in the defendant's decision **to subject Dr. Ennix to heightened peer review and to suspend and restrict his surgical privileges.**

If you find that Dr. Ennix has proved both of these elements, your verdict should be for Dr. Ennix. If on the other hand, Dr. Ennix has failed to prove either of those elements, your verdict should be for the defendant.

Authority:

See Comment to Instruction 10.1A (Disparate Treatment—Where Evidence Supports “Sole Reason” or “Motivating Factor”)

Disputed Jury Instruction 10: Evidence of Discrimination

Dr. Ennix's belief that defendant Alta Bates Summit Medical Center acted based on race discrimination, without evidence supporting that belief, is not enough to establish his claim.

The mere fact that Dr. Ennix is African American and **[his surgical privileges were restricted]** is not sufficient to establish Dr. Ennix's claim under the law.

Carmen v. San Francisco Unified School District (9th Cir. 2001) 237 F.3d 1026, 1028..
Fed. Jury Prac. & Instr. § 170.20 (5th ed.) **[modified]**

Disputed Jury Instruction No 10, Re Evidence of Discrimination,

Offered by Plaintiff

Plaintiff contends that no such instruction should be given.
The proposed is argumentative and unnecessary in that it
merely states that the jury should not find for plaintiff if
plaintiff has not proved the elements of his claim.

Disputed Jury Instruction 15: Malice

Do you find that the Alta Bates Summit Medical Center engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of Dr. Ennix?

Pretrial Conference Order, ¶ 32.

42 U.S.C. § 1981a.

Disputed Jury Instruction 15: Malice, Offered by Plaintiff

Plaintiff contends that no such instruction should be given.

Disputed Jury Instruction 16: Similarly Situated:

Plaintiff can demonstrate pretext by showing that defendant treated a "similarly situated" non-African American person better than it treated plaintiff.

A person is similarly situated to plaintiff if the two are the same in all material respects.

Individuals are similarly situated when they have similar responsibilities and displayed similar conduct

If you believe by a preponderance of the evidence that plaintiff has proven that other similarly situated non-African American people committed similar acts and were not subject to similar **[restrictions on his or her surgical privileges,]** then you may find defendant's asserted reasons pretextual.

Beck v. UFCW, Local 99, 506 F.3d 874, 885 (9th Cir. Ariz. 2007)

Vasquez v. City of Los Angeles, 349 F. 3d 634, 641-42 (9th Cir. 2003).

Disputed Jury Instruction No 16, Re Similarly Situated, Offered by

Plaintiff

Dr. Ennix can demonstrate pretext by showing that defendant treated a "similarly situated" non-African American person better than it treated Dr. Ennix.

A person is similarly situated to Dr. Ennix if the two are the same in all material respects.

Individuals are similarly situated when they have similar responsibilities and display similar conduct.

If you believe by a preponderance of the evidence that Dr. Ennix has proven that other similarly situated non-African American people committed similar acts and were not subject to similar **heightened peer review and restrictions on their privileges** then you may find defendant's asserted reasons pretextual.

Authority:

Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 147 (2000).

Beck v. United Food and Commercial Workers Union, Local 99, 506 F.3d 874, 883 (9th Cir. 2007).

Vasquez v. County of Los Angeles, 349 F.3d 634, 641 (9th Cir. (Cal.) 2003).

1 DATED: May 12, 2008

Respectfully submitted,

2 KAUFF MCCLAIN & MCGUIRE LLP

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6 Attorneys for Defendant
7 ALTA BATES SUMMIT MEDICAL
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9 DATED: May 12, 2008

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